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ATLANTIC TRUST & DEPOSIT CO. *v.* UNION TRUST & TITLE CORPORATION *et al.*

Sept. 9, 1909. Rehearing Denied March 10, 1910.

[67 S. E. 182.]

1. Interest (§ 36*)—Rate—Contract—"Interest."—A loan made under a contract providing for a loan of \$70,000 for one year, with 6 per cent. interest, payable semiannually, and providing for the payment of a cash commission of \$1,400 for the loan, is not a loan of \$70,000 for one year at 6 per cent. interest, payable semiannually, but a loan at 8 per cent. interest; the commission being "interest."

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 36.* 13 Va.-W. Va. Enc. Dig. 442, *et seq.*

For other definitions, see Words and Phrases, vol. 4, pp. 3706-3709.]

2. Principal and Surety (§ 41*)—Contracts—Obligations.—Where one proposes to become surety for another, the obligee need not seek out the surety and explain to him the extent of the obligation, and is not responsible for fraudulent representations made to the surety by the principal, or by a third person, unless made with his knowledge or consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 78-81; Dec. Dig. § 41.* 13 Va.-W. Va. Enc. Dig. 12, *et seq.*]

3. Principal and Surety (§ 39*)—Contracts—Obligations.—Where, with the knowledge or assent of the obligee in a bond, a misrepresentation was made to the surety therein as to any material fact, and if he had known thereof he might not have entered into the undertaking of suretyship, the undertaking was invalid, and the surety discharged from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82-85; Dec. Dig. § 39.* 13 Va.-W. Va. Enc. Dig. 11.]

4. Principal and Surety (§ 39*)—Contracts Secured—Contract of Suretyship—Variance.—A corporation engaged in constructing a hotel applied to plaintiff for a loan of \$70,000, and gave a bond conditioned on the completion of the building before a designated date free from mechanics' liens. The bond recited that plaintiff had agreed to loan to the corporation \$70,000 for one year, with 6 per cent. interest, payable semiannually. The contract of loan provided for the payment of 6 per cent. interest for the money loaned, for a commission of \$1,400 in cash for making the loan, and for the repayment of \$15,000 before the expiration of the year. Of the loan \$8,000 had at the time of the execution of the bond been secured by the corporation. Plaintiff delivered to the corporation only \$60,600, instead of \$70,000. The bond was prepared by plaintiff. Held, that the representations

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

in the bond as to the terms of the loan were material and false, relieving the surety from liability, unless he had notice of the true character of the loan.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 82-85; Dec. Dig. § 39.* 13 Va.-W. Va. Enc. Dig. 11.]

5. Principal and Surety (§ 162*)—Contracts Secured—Contract of Suretyship—Variance.—Whether a surety in a bond given by a borrower had notice of the true character of the loan, notwithstanding the false and material recitals in the bond as to the terms of the loan, is for the jury.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 443; Dec. Dig. § 162.* 13 Va.-W. Va. Enc. Dig. 11, 12; 5 id. 351.]

6. Principal and Surety (§ 108*)—Discharge of Surety—Change in Contract.—The surety in a bond given by a corporation borrowing money for the construction of a hotel, conditioned on the completion of the building before a designated date free from mechanics' lien, is not discharged from liability because of an agreement, without consideration, between the lender and the corporation, that the money loaned is only to be had as the corporation needs it for the building, though the lender has in his hands over one-tenth of the money agreed to be loaned when the bond sued on was forfeited.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 213-218; Dec. Dig. § 108.* 13 Va.-W. Va. Enc. Dig. 18, 19, 30, et seq.]

Error to Law and Chancery Court of City of Norfolk.

Action by the Union Trust & Title Corporation against the Atlantic Trust & Deposit Company and another. There was a judgment for plaintiff against defendant Atlantic Trust & Deposit Company, and it brings error. Reversed and remanded.

Jeffries, Wolcott & Lankford and Floyd Hughes, for plaintiff in error.

Thomas H. Willcox, E. H. Bilisoly, Richard D. Cook, and *Walter H. Taylor*, for defendant in error.

VIRGINIA & K. RY. CO. *v.* HENINGER.

Sept. 9, 1909. Rehearing Denied March 10, 1910.

[67 S. E. 185.]

1. Contracts (§ 170*)—Construction—Construction by Parties.—Where the provision of an excavating contract, providing the method of measuring the material excavated, was ambiguous, the practical construction placed upon it by the parties was entitled to great con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.